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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

FRED FERRARA AND ARTHUR RUSSELL, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The United States District Court for the Southern District of New York wrote no opinion. The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported. It is reprinted as Appendix A, pp. 1a-12a, *infra.*

JURISDICTION

The decision of the Court of Appeals was issued on November 5, 1971. A timely Petition for Rehearing was denied on December 6, 1971, (p. 13a, *infra*). On December 28, 1971, Mr. Justice Marshall extended the time to file this Petition to January 19, 1972. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is a defendant entitled, for the purpose of cross-examination of a key prosecution witness, to the production of that witness' testimony against the same defendant before a grand jury in another case?

2. If a defendant is not so entitled, absent an *in camera* inspection of the grand jury testimony by the trial court, what standards should govern the trial court's determination?

STATUTE AND RULE INVOLVED

This case involves the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. § 401 *et seq.*, specifically §§ 201(b) and (d), 501(c) and 503(a). It also involves Rule 6(e) of the Federal Rules of Criminal Procedure. These provisions are reprinted in Appendix C, pp. 15a-17a, *infra*.

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE TRIAL COURT.[1]

1. The Evidence at Trial.

This case involves a criminal prosecution pursuant to a multi-count indictment under the Labor-Management Reporting and Disclosure Act of 1959 (hereafter "the Act"). During the period 1964 to 1967 covered by the indictment, petitioner Ferrara was president of Chain Service Restaurant Luncheonette and Soda Fountain Employees Union Local 11 (herein "Local 11" or "the Union"), and petitioner Russell was its secretary-treasurer.

The present Petition is addressed only to an error of the trial court, sustained by the Court of Appeals, with respect to the cross-examination of a key prosecution witness, one James Gleason. For that reason, the charges on which petitioners were tried and the evidence adduced need be described only to demonstrate the importance of Gleason's testimony as the case went to the jury. Understanding will be aided by treating separately with what have been referred to below as "the loan counts," "the conversion counts," and "the filing counts."

a. The Loan Counts.

Section 503(a) of the Act prohibits the making of loans in excess of $2000 from a labor organization as

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[1] As used throughout this Petition, "Tr." refers to the transcript in the District Court which was reproduced without repagination in Vols. II-IV of the Joint Appendix in the Court of Appeals. Vol. I of the Joint Appendix consists of formal documents, unsealed exhibits, and excerpts from the sentencing transcript. The entire Joint Appendix is part of the record which has been transmitted to the Clerk of this Court.

therein defined to an officer of a labor organization; § 201(b)(4) requires that every labor organization file annually with the Secretary of Labor a financial report stating any direct and indirect loans made to any officer, employee, or member aggregating more than $250 during that year. The indictment alleged that petitioners had violated these provisions by virtue of a $3000 loan which had been made to James Gleason, an officer of Local 11, by the Officers' Pension Fund of Local 11, and which was not reported. The form of the loan was a check by the Fund made out to one William Schamber (also an officer of Local 11) with the understanding that Schamber would transfer the money to Gleason. It was the view of the defense that this transaction was entirely lawful because the Fund was not a "labor organization," but was rather a "trust in which a labor organization is interested" as separately defined in § 3(1) of the Act[2] to which the loan prohibitions do not apply. The prosecution's theory, however, was that the Pension Fund was a "labor organization," that the defendants knew that it could not lawfully make a loan to an officer, and that the check was made out to Schamber rather than Gleason to circumvent the prohibitions of § 503(a). The circumstances of the loan were described primarily by Gleason and Schamber.[3]

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[2] In its description of the defendants' position, the Court of Appeals inadvertently said (p. 5a, *infra*) that this definition appears in § 3(1) of the Welfare and Pension Disclosure Act, 72 Stat. 997, as amended 76 Stat. 35, 29 U.S.C. §§ 301-309.

[3] Gleason also testified that defendant Ferrara had told him in Russell's presence that it would be impossible for him to loan Gleason money from the Officer's Pension Plan because the union's lawyer, Harold Luxemburg had told him that such a loan would be illegal. Ferrara added however, that it would not be illegal

b. The Conversion Counts.

Section 501(c) of the Act prohibits union officers and agents from converting union funds to their own use or the use of others. It was the prosecution's theory that certain expenditures by the Union, though purportedly for the Union's benefit, were actually unauthorized and for the benefit of petitioners and Union employees favored by them. The expenditures for which petitioners were ultimately convicted were for the leasing of automobiles, for gas and oil, and for two dinners at the Freeport Tuna Club, an organization in which petitioner Russell was an official.[4]

In order to establish a violation of § 501(c) it was incumbent on the prosecution to establish that the expenditures were not for a union purpose and that they were not authorized. See p. 8a, *infra*.[5] It was the defendants' position that the automobile expenditures were necessary to enable business agents and the officers to service and organize the far-flung jurisdiction of the Local, geographically the largest in the International. They also submitted that the dinners at the Freeport Tuna Club were legitimate social occasions, and that other local unions took tables at the same

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for a "manager like Billy Schamber", whom Ferrara knew to be a friend of Gleason's, to receive such a loan. (Tr. 191-193). This testimony was denied by Ferrara and Luxemburg. (Tr. 571, 795-798). There was therefore a square credibility conflict between Gleason on the one hand and one of the defendants and another of their witnesses on the other.

[4] Petitioners were acquitted on the counts charging improper expenditures for meals, prescription drugs, tobacco and liquor. See p. 3a, *infra*.

[5] The rule in the Second Circuit is that authorization is not a defense if it is established that the union was dominated. See p. 8a, *infra*. The propriety of that exception is not in issue here.

affairs and that employer representatives were also present. The Government, on the other hand, contended that the expenditures were not necessary for the Union.

Again, on the conversion counts, the principal prosecution witness was Gleason. The latter minimized the need for automobiles in servicing the jurisdiction and in organizational drives. (Tr. 202 *et seq.*). He also testified that the Executive Board had not authorized the leasing of the automobiles. (Tr. 199-202, 277). With respect to the expenditures for the Freeport Tuna Club, Gleason testified that on one occasion he along with other business agents and their wives were invited by Russell to attend an affair at his club. In his view this was a purely social evening with no union business conducted (Tr. 209-211, 278).

c. The Filing Counts.

The filing counts charged that the defendants had violated §§ 201(b) and 209(b) of the Act because the annual reports filed by Local 11 with the Secretary of Labor did not list expenditures, which were charged in the conversion counts, as having been made to officers. The expenditures were listed on p. 2 of the reports as union expenditures but not on p. 4 as part of the schedule "Disbursements to Officers."[6]

The content of the reports was, of course, stipulated. These counts were derivative from the conversion counts, and, as the Government conceded at trial (Tr.

[6] The Government's position was, "Well, of course, they are reported in other places, and that is exactly the essence of what the charge is. They are reported in the wrong places." (Tr. 1055).

1056), if defendants had been acquitted on the conversion counts, they would also have been entitled to acquittal on the filing counts. The defense also contended that any mistake in the place of reporting was due to the advice of their attorney and counsel and was not a "knowing" violation within the terms of the statute.

2. The Trial Court's Rulings on the Grand Jury Minutes.

After James Gleason's direct examination was completed, the prosecuting attorney turned over to defense counsel the minutes of Gleason's testimony before the grand jury which had returned the instant indictment. The prosecutor also advised the Court that Gleason had testified against the defendants before another grand jury, but refused to make that testimony (identified as GX3510A) available to the defendants. He made a claim of irrelevancy and confidentiality for these minutes. (Tr. 302-303).[7] The trial court said that he would read the materials and on the basis of

[7] "Your Honor, with respect to Mr. Anolik's statement with respect to the Jencks Act material of Mr. Gleason yesterday, I should have known that Mr. Gleason has given statements and has testified with regard to the indictment pending in this courthouse. I have a statement, typed statement, and a written statement in the possession of the government by Mr. Gleason, which I am handing up to the court now.

THE COURT: Let's have it marked first.

MR. BEN-VENISTE: 3510A for identification.

(Government's Exhibit 3510A marked for identification.)

THE COURT: Is it the government's position that this does not relate to his testimony here?

MR. BEN-VENISTE: And disclosure would be prejudicial to the government with respect to the pending indictment.

that *in camera* inspection would determine whether the defense was entitled to see them. (Tr. 305). Subsequently, the trial court ruled that the defense was not entitled to the materials. (Tr. 329).[8]

3. The Verdict and Sentence.

The jury returned verdicts of guilty on all the loan counts, on the conversion counts with respect to the leasing of the automobiles, the oil and gas, the Freeport Tuna Club dinners, and with respect to all the filing counts. Motions for new trial and in arrest of judgment were denied. On December 12, 1970, the District Court sentenced petitioner Ferrara to concurrent six-month sentences on Counts 1 and 2, a three-year sentence on the remaining counts, suspended subject to the condition that he repay $17,000 to Local 11 and publicize the sentence in the union newspaper. Petitioner Russell was fined $500 on Counts 1 and 2, and sentenced to two years imprisonment on the remaining counts, suspended subject to the condition that he repay $5,000 to Local 11.

B. PROCEEDINGS IN THE COURT OF APPEALS.

In their appeal to the Court of Appeals petitioners raised numerous issues respecting the legal theories on which the case was submitted to the jury and the sufficiency of the evidence. Petitioners also contended

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[8] "First of all, I have had ample opportunity to read Government's Exhibit 3510A for identification. In my judgment it has nothing whatsoever to do with the testimony of Mr. Gleason in this trial. Therefore, I am going to direct that this exhibit be sealed and kept confidential as requested by the government, most particularly as it quite obviously refers to another case which to my knowledge has not been brought to trial. And so 3510A will be sealed and made a part of the record of this case."

that the trial court had made several prejudicially erroneous evidentiary rulings. These included the trial court's refusal to turn over to the defendants for cross-examination of Gleason his testimony before the second grand jury. Defendants asserted both that they had made a sufficient showing of need for the production of the testimony without the necessity of an *in camera* determination by the judge, and that, even if *in camera* inspection was proper, the trial court erred in its conclusion, on the basis of such inspection, that the defense could not benefit from production. With respect to the latter claim, petitioners expressly requested the Court of Appeals to make its own examination of the materials.

The Court of Appeals affirmed the convictions on the conversion and filing counts; with respect to the loan counts, the court directed a new trial because, in its view, the question whether the Officers' Pension Fund was a separate entity from the union should have been submitted to the jury. The Court's opinion discussed only one of the evidentiary issues raised by petitioners, whether Gleason's cross-examination was improperly curtailed with respect to certain charges which had been brought against Gleason within the union and which, in petitioners' view, reflected adversely on Gleason's credibility, pp. 10a-11a, *infra*. The court rejected petitioners' contention that they were entitled to production of Gleason's testimony before the second grand jury. The Court of Appeals' opinion does not even reveal whether the Court made an independent examination of his testimony to decide whether the trial court properly determined on the basis of its *in camera* inspection that defendants had no need for these minutes.

Petitioners filed a Petition for Rehearing in the Court of Appeals addressed solely to evidentiary issues which had not been discussed in the Court's opinion. In that Petition subsequent developments bearing on the production of Gleason's testimony before the second grand jury were noted. The trial on the indictment returned by the second grand jury had taken place, Gleason had testified at that trial, and his grand jury testimony had then been produced for the use of the defense to cross-examine Gleason. It was also stated that while appellate counsel had not seen the exhibit, since they did not also represent the defendants at the second trial, it was their understanding that Gleason had testified that he had engaged in a conspiracy with the defendants to violate § 302 of the Labor-Management Relations Act, 29 U.S.C. § 186. We therefore submitted to the Court of Appeals that the trial court in the present case must have erred in refusing to direct production of GX 3510A because it obviously had substantial impeachment value in the present case. Petitioners simultaneously filed a motion to allow counsel to inspect and copy GX 3510A and to demonstrate by its contents, in a supplement to the Petition for Rehearing, that the trial court had erred. It was therein urged that whatever theoretical justification might previously have existed for withholding that exhibit was eliminated with the second trial and particularly its production to defendants at that trial.

On December 6, 1971, the Court of Appeals, without opinion, denied the Petition for Rehearing and denied the motion for production. (See pp. 13a, 14a, *infra*.)

REASONS FOR GRANTING THE WRIT

The Decision Below Raises Important Questions Concerning the Administration of Criminal Justice in the Federal Courts.

In *Dennis* v. *United States*, 384 U.S. 855, this Court directed the production at trial of testimony which key prosecution witnesses had given before the grand jury. It was held that the petitioners there had made a showing "substantially beyond the minimum required by Rule 6(e) and the prior decisions of this Court" of a particularized need for these materials (*id.* at 872); that need was for cross-examination and impeachment of prosecution witnesses. The Court expressly rejected the suggestion that *in camera* inspection by the trial court would be an appropriate or satisfactory substitute for production where a particularized need has been shown. *Id.* at 874-875.

The *Dennis* case rested on two important principles of criminal law. First,

> "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." (384 U.S. at 873).

Second,

> "Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' *Pittsburgh Plate Glass*, 360 U.S., at 410, (dissenting opinion). Nor is it

realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge." *Id. at* 874-875.

This Court's appreciation of the hazards of displacing "well-informed advocacy" by resort to *ex parte* determinations again resulted in rejection of *in camera* proceedings in *Alderman* v. *United States*, 394 U.S. 165, 180-185.

The ruling of the courts below that defendants were not entitled to production of GX 3510A is wholly inconsistent with these principles. By withholding production because the testimony sought had been given before a different grand jury,[9] those courts introduced into the application of *Dennis* a distinction which is unsupportable either on the basis of greater importance for confidentiality, or lesser need by the defendant for production. Further, the trial court's determination, based on its *in camera* inspection, that GX 3510A would not be useful for cross-examination denied the defense access to material which would have been valuable for impeachment of a key prosecution witness. Compare *Alford* v. *United States*, 282 U.S. 687, cited in *Dennis*, 384 U.S. at 873, n. 20. Even on the basis of the information presently available to

[9] Although the Court of Appeals wrote no opinion on this subject, it is clear that the single controlling circumstance in denying production was the fact that the testimony sought to be produced was given before a different grand jury. Subsequent to *Dennis*, the Second Circuit had promulgated a rule that defendants will always be entitled to production for cross-examination of the witness' testimony before the grand jury which returned the indictment under which the defendant is then being tried. *United States* v. *Youngblood*, 379 F.2d 365 (C.A. 2).

petitioners, that ruling is so plainly incorrect that it forcibly demonstrates the need for guidance by this Court to trial courts regarding the standards which they should follow when, notwithstanding *Dennis*, production is subject to prior *in camera* inspection.

1. The ruling below that *Dennis* was inapplicable because the testimony sought to be produced was given before a grand jury other than that which returned the present indictment is in direct conflict with *United States* v. *Hughes*, 413 F.2d 1244 (C.A. 5), cert. granted *sub nom. United States* v. *Gifford-Hill-American, Inc.*, 396 U.S. 984, vacated as moot, 397 U.S. 93. *Hughes* was an antitrust prosecution based on an indictment returned by a grand jury in Dallas, Texas. The defendants moved for production of testimony of the defendants' present or former officers and employees before the Dallas grand jury which indicted them and before a Los Angeles grand jury which previously had investigated a similar alleged conspiracy involving some of the defendants in the Texas prosecution. The defendants also moved for the production of all documents material to the preparation of the defense, including transcripts of the Dallas and Los Angeles grand juries. See 413 F.2d at 1246-1247. The District Court ordered discovery of the testimony given by present and former officers before *both* grand juries. And on a petition for mandamus by the defendants the Fifth Circuit, expanded discovery, directing production of all documents before both grand juries which would be material to the defense. The Fifth Circuit's opinion drew no distinction whatsoever between testimony produced before the Los Angeles grand jury and that before the Dallas grand jury. Indeed, the Government acquiesced in the production of certain portions of the minutes of the other, Los Angeles, grand jury. See *id.* at 1247.

The conflict in result between the decision below and that *Hughes* is, we submit, sufficient to warrant certiorari in a matter of such importance to the administration of criminal law. Moreover, the evaluation of the considerations bearing on disclosure in the *Hughes* opinion is wholly at odds with the refusal of the courts below to direct production here. In *Hughes*, the Fifth Circuit recognized the importance of discovery in criminal cases. It placed on the Government the burden to show affirmative reasons why discovery should be denied. And specifically with respect to grand jury minutes, the court made clear that grand jury secrecy was not to be a fetish but was to be observed only where it served a significant purpose:

> "The government emphasizes strongly the 'long established policy that maintains the secrecy of the grand jury proceedings in the federal courts,' United States v. Procter & Gamble Co., 356 U.S. 677, 681. Access to grand jury transcripts, like all discovery in criminal cases, traditionally has been restricted, but there has been a growing tendency to limit secrecy after the grand jury has completed its work to those cases where secrecy serves legitimate policy considerations." [10]

The court regarded it of particular significance that the Los Angeles grand jury had "completed its work." *Id.* at 1257. Here, too, the second grand jury before which Gleason testified had "completed its work" and returned an indictment against petitioners and others at the time of the trial herein.

We emphasize that the proposition "that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal

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[10] 413 F.2d at 1256, footnotes omitted.

justice" (*Dennis, supra,* 384 U.S. at 870) does not always aid the defense at the expense of the prosecution. See particularly *Williams* v. *Florida,* 399 U.S. 78, 80-86, where compulsory disclosure by the defense was sustained in the face of a vigorous claim based on the constitutional privilege against self-incrimination. As the Court there said: "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played."[11] *A fortiori,* a party may not conceal its cards permanently, at least absent a showing of substantial, rather than merely theoretical, countervailing interests. In this case the Government made no showing of potential injury, but rather presented a naked claim of confidentiality. (Tr. 302, p. 7 n. 7, *supra*). In *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400, this Court held that defendants are not entitled to production of grand jury statements on a mere claim "that they had a 'right' to the transcript because it dealt with subject matter generally covered at the trial." If the principles of *Dennis* and *Hughes* are to be respected, and discovery in criminal proceedings is not to be frustrated, this Court should hold that an unsupported claim of confidentiality should likewise be unavailing.

The distinction drawn below cannot be supported in terms of the reasons generally given for grand jury secrecy at least where, as here and in *Hughes, supra,* the grand jury has completed its work. See *United States* v. *Procter & Gamble Company,* 356 U.S. 677, 681, n. 6, quoting the summary of those reasons in *United States* v. *Rose,* 215 F.2d 617, 628-629 (C.A. 3). Nor does the circumstance that the prior testimony

[11] *Id.* at 82, citing Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?,* 1963 Wash. U. L. Q. 279, 292.

was given before a different grand jury remove its value for the defendant. As was recognized even before *Dennis*, "the use of the grand jury testimony at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like" is a particularized need which warrants lifting the veil of secrecy. See *United States* v. *Procter & Gamble*, 356 U.S. 677, 683; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400.

If inconsistency with his trial testimony were the only basis on which a witness' grand jury testimony were of potential use for impeachment, it would make sense to limit production of his grand jury testimony to that which bears on the pending indictment. But, of course, witnesses are subject to impeachment on other grounds as well, particularly by demonstration of bias against the defendant or other interest in aiding the prosecution. See, e.g., *Alford* v. *United States*, 282 U.S. 687, 693; *Gordon* v. *United States*, 344 U.S. 414, 422; *Dennis*, *supra*, 384 U.S. at 873 (par. 4); 3A Wigmore, *Evidence*, § 967 (Chadbourn rev. 1970). Any relationship which the witness has had with the defendant may indicate bias and the record of his prior testimony against the same defendant is a particularly strong foundation for such inquiry on cross-examination.[12] Accordingly, the principle enunciated in *Dennis* that "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact" (384 U.S. at 873) is fully applicable where a witness at

[12] See 3A Wigmore, *Evidence*, § 949 (Chadbourn rev., 1970). Facts tending to show bias may be adduced even by extrinsic testimony. *Id.*, § 948. Thus, a witness' prior grand jury testimony against the same defendant would be used not only for cross-examination but as independent evidence of bias.

trial has previously testified against the defendant before *any* grand jury.

2. The circumstances of this case demonstrate that the foregoing analysis, rather than the decision below, accords with reality. For it now appears that in testifying before the second grand jury, Gleason admitted that he had conspired to violate 29 U.S.C. § 186 (see p. 10, *supra*); his motive to gain favor with the prosecution by testifying against these defendants was therefore clear.[13] That the record of this testimony was withheld from the defense after the trial court's *in camera* inspection, confirms the insight that "determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis, supra*, at 875. See also *Alderman, supra*, particularly at 183-184. Moreover, the affirmance of that patently erroneous ruling by the Court of Appeals demonstrates that the lower federal courts sorely need guidance concerning the standards which they should apply on those occasions when production is properly subject to *in camera* inspection by the court.

The present case is a particularly appropriate vehicle for delineating those standards because it need not be considered in the abstract. By the very nature of the problem, defense counsel are usually not in a position to comment on the correctness of a court's ruling in withholding documents which counsel have not seen.[14] But in this case counsel are no longer

[13] His admission would also have reflected adversely on Gleason's character, and thus his credibility.

[14] That is the position in which defendants found themselves below. As we said to the Court of Appeals, "never having seen this exhibit, we cannot even begin to argue how it would have been used at trial." Reply Brief of Appellants, p. 36.

completely in the dark, and the assertion that the courts below utilized an improper standard can be made with considerable assurance. Moreover, the trial court's explanation of its ruling, after inspection, that the exhibit need not be produced, leaves no doubt that it approached the problem from too limited a perspective. The court said that the exhibit "has nothing whatsoever to do with the testimony of Mr. Gleason in his trial." (Tr. 329, set forth at p. 8, n. 8, *supra*). Confusing the familiar with the necessary, the trial court apparently assumed that grand jury minutes must be made available for cross-examination only if they contain inconsistencies with the witness' trial testimony. It overlooked the potential use of the exhibit for impeaching Gleason on the ground of bias and character, thereby materially curtailing petitioners' right of cross-examination. See p. 16, *supra*. The Court of Appeals' affirmance could only have been based on the same misapprehension. This Court should squarely hold that a defendant is entitled to production of materials in the possession of the Government, even if otherwise privileged, if they will on any basis materially aid the impeachment of a prosecution witness. It would also be appropriate to remind the trial courts that precisely because they are handicapped in determining what materials may be useful to the defendant, they should resolve all reasonable doubts in favor of production. Only if that test is met can "the defense, the judge and the jury * * * have the assurance that the doors that may lead to truth have been unlocked." *Dennis, supra*, at 873.

3. For the foregoing reasons, the importance of the questions presented to the administration of criminal justice amply warrants the granting of this Petition.

The appropriateness of review is likely to be enhanced by this Court's decision in another case in which certiorari has already been granted. In *United States v. United States District Court*, No. 70-153, the Government makes a frontal attack on that portion of the *Alderman* holding which deals with *in camera* inspection of material prior to production. *Id.*, Brief for the United States, pp. 35-47. If the Court should nonetheless reaffirm *Alderman's* objections to *in camera* proceedings even in the context of national security wiretaps (however defined), it will be all the clearer that the courts below erred in withholding production here, where the considerations favoring secrecy are far weaker, if they exist at all. Alternatively, if this Court should limit or overrule *Alderman* and thereby foster the practice of *in camera* inspection, the need of the lower courts for standards in performing this exacting task will be even more acute.

CONCLUSION

This Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 965—September Term, 1970.

(Argued July 12, 1971 Decided November 5, 1971.)

Docket No. 71-1069

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

FRED FERRARA and ARTHUR RUSSELL, *Defendants-Appellants.*

Before: FRIENDLY, *Chief Judge,* LUMBARD and OAKES, *Circuit Judges.*

Defendants appeal from judgments of conviction entered in the United States District Court for the Southern District of New York after trial before a jury and Harold R. Tyler, Jr., *Judge,* based upon several violations of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*

Affirmed in part, reversed and remanded in part.

MOZART G. RATNER (Bernard Ries and George Kaufman on the brief), Washington, D. C., *for Defendants-Appellants.*

HAROLD BAER, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney, Richard Ben-Veniste, W. Cullen McDonald and Jack Kaplan, Assistant United States Attorneys, of counsel), *for Plaintiff-Appellee.*

OAKES, *Circuit Judge:*

Fred Ferrara and Arthur Russell appeal from convictions, after trial before Harold R. Tyler, Jr., Judge, and a jury, on nine counts of a fourteen count indictment charging violations of the "Landrum-Griffin Act," officially called the Labor-Management Reporting and Disclosure Act of 1959.[1] During the period covered by the indictment, Messrs. Ferrara and Russell were president and secretary-treasurer, respectively, of Local 11, Chain Service Restaurant, Luncheonette and Soda Fountain Employees and Bartenders Union (AFL-CIO), hereafter Local 11 or the Union.

The counts on which each of the appellants was convicted charged them as follows: One, with causing Local 11 to make a loan in excess of $2,000 for the benefit of James Gleason, a third officer of the Union, contrary to 29 U.S.C. § 503(a); Two, with failing to report the Gleason loan in Local 11's Annual Report, in violation of 29 U.S.C. §§ 431(b) and 439(b) and (d); Four, Eight and Nine, with causing Local 11 to spend money for leasing several autos for the period 1964-67 (Count Four), for gas and oil used exclusively by appellant Ferrara (Count Nine), and for payments to the Freeport Tuna Club (Count Eight), all contrary to 29 U.S.C. § 501(c) (embezzlement and conver-

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[1] 29 U.S.C. § 501 *et seq.*

sion); and Eleven to Fourteen inclusive with failure properly to report as disbursements to Union officers the amounts referred to in Counts Four, Eight and Nine, as well as additional sums, in reports filed in each of the years 1965-68 for the preceding year, contrary to 29 U.S.C. §§ 431(b) and 439(b) and (d).

Acquittals were had on four counts—charging conversion of Union funds by improper expenditures—Counts Five (meals), Six (prescription drugs), Seven (tobacco) and Ten (liquor), and on Count Three charging appellant Russell with failure to maintain certain required records.

As appellants' arguments are many, and vary from count to count, we will refer to them separately.

Counts One and Two relate to the Gleason loan, one made to a Local 11 business agent from the Officers' Retirement Fund in the amount of $3,000 on or about September 23, 1965. Taking the evidence in the light most favorable to the Government, *United States* v. *Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963), appellants, longtime chief officials of Local 11, knew that Union funds in excess of $2,000 could not be directly loaned to Gleason, since he was an "officer or employee" of the Local within the direct prohibition of 29 U.S.C. § 503(a). That they knew this is established by the testimony of the Union's attorney, who testified that he also advised them that "the union was a labor organization as defined by the Landrum-Griffin Act," but that it would be proper to make a loan from the "Officer's Pension Fund of Local 11," a retirement plan trust sometimes referred to in the record as the "Officers' Retirement Fund" or "Retirement Plan" (referred to hereafter as Retirement Fund or Fund).

A loan was made indirectly to Gleason by Ferrara and Russell from money in the Retirement Fund. A $3,000 check on the Fund, payable to Gleason, was voided and a subsequent check was drawn by Russell, payable to William

Schamber, a Walgreen Drug Company food and fountain manager and member of Local 11's executive board from 1956 to 1967. Schamber endorsed the check and gave the Local security in the form of a statement that, after a stated date, 80 per cent of his (Schamber's) salary could be deducted until the loan was repaid. Appellants concededly knew that the loan was going to Gleason, knowledge that would make the loan improper if it were an indirect loan by the Union under 29 U.S.C. § 503(a). We thus need not determine whether the loan was made through Schamber as a conduit because, on the one hand, as the Government argues and as Gleason testified, appellant Ferrara told Gleason that the Local's attorney thought it was "illegal for anybody to take a loan," but not illegal for a manager like Schamber to receive it, or because, on the other hand, as appellants contend, Gleason was not financially responsible and Schamber was.[2]

Was the Retirement Fund here an instrumentality of the Union, however, so as to justify treatment of the loan as a matter of law—as it was treated by the court below—as an "indirect" loan made by the Union? It is plain that, generally speaking, retirement plan trusts are not included in the definition of a labor organization in § 3(i) of the Act, 29 U.S.C. § 402(i).[3] Rather, they generally fit within

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[2] Weighing against Gleason's testimony and the Government's point is that Schamber was also apparently an officer of the Union within the prohibition of the Landrum-Griffin Act; although not full-time or paid, as a member of the executive board he would seem to be an "officer" both within the Local 11 By-Laws and the Act, and if he were an officer a loan to him would be just as illegal as a loan to Gleason. Weighing against appellants' contention, however, is the fact that by the use of a friendly officer at the Union's bank, Gleason was never required to endorse the check.

[3] "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and

the definition of a "trust in which a labor organization is interested," as separately set forth in the Welfare and Pension Plans Disclosure Act, § 3(1), 29 U.S.C. § 402(1) The Government points out that the Union created the Retirement Fund and could abolish it, that there were no outside or independent trustees, and that no one but a Union officer or employee could benefit from the Fund. The Government also suggests that after the first year all the money deposited in the Fund account came from the general moneys of the Union and claims—although this is doubtful [4]—that in the event of termination, all sums over and

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which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body. 29 U.S.C. § 402(i).

[4] The Trust under the Plan provides:

> ARTICLE IX: DURATION AND TERMINATION OF THE TRUST
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> Section 1) Unless sooner terminated, the Pension Fund herein established shall be irrevocable and shall continue indefinitely, provided, however, that the membership of the Union, after written notice and at a special meeting duly called for that purpose only, may revoke and terminate this trust upon six (6) months [sic] written notice to the trustees at the office of the Pension Fund, and the trust hereinabove established shall be deemed terminated at the expiration of such period and all funds, securities, notes, valuables and properties in the possession of the trustees and held or owned by them under this Declaration of Trust shall be turned over to such agency as may be determined and designated by the Union. No such termination, however, shall be effectuated unless at the time of such termination a fully funded pension is provided for each officer who is then entitled to a pension. . . .

The Plan itself provides:

> 4.2 *Irrevocability of Contributions*—Any and all contributions made by the Union shall be irrevocable and shall be trans-

above those vested in the beneficiaries are to revert to the Union. The appellants argue, as they did to the court below, that the Retirement Fund was separately approved by the Internal Revenue Service (although it affects fewer than 25 employees),[5] that there was no commingling of Retirement Fund money with Union money, and that in the event of termination the interests of the participating members "fully vest. . . ."[6] Thus, appellants' argument runs, the Fund was a separate and independent entity.

Whether the Government's or the appellants' thesis is correct was never submitted as an issue to the jury, the trial court assuming that the sums in the Retirement Fund consisted of Union money. To be sure, the trial court did give appellants the benefit of a charge with respect to intent, based upon the Union attorney's alleged advice, but the question whether the Retirement Fund money was really the Union's was not submitted.

The trial court reasoned, and the Government argues, that, if the Fund were not treated as Union money for the purposes of 29 U.S.C. § 503(a), the Landrum-Griffin Act would have a hole in it "so big that a fleet of abuses [sic] can go in through abreast." But we cannot rewrite the statute for Congress.

This is a criminal statute we are construing, and we have been admonished not to "enlarge the reach of enacted

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ferred to the Trustees and held as provided in this Plan and the Trust Agreement to be used in accordance with the provisions of this Plan in providing the benefits and paying the expenses of the Plan, and neither such contributions nor any income therefrom shall be used for or diverted to purposes other than for the exclusive benefit of, or on account of Members, and payment of administration expenses of the Plan."

[5] Int. Rev. Code of 1954, § 401(a)(3).

[6] Section 11.2, added by undated Amendment, approved apparently by I.R.S.

crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). There is separate legislation controlling welfare and pension benefit plans and requiring disclosure of loans made from such plans.[7] Here a jury might find the Fund to be a bona fide separate and distinct entity and not one established to evade legal prohibitions against certain disbursements of union funds, or it might find, to the contrary, that the fund was an instrumentality of the Union, as occurred in *United States* v. *Pipefitters Local 562*, 434 F.2d 1116, 1121 (8th Cir. 1970), *cert. granted*, 402 U.S. 994 (1971). *See also United States* v. *Roth*, 333 F.2d 450, 453 (2d Cir. 1964) (2-1 decision), *cert. denied*, 380 U.S. 942 (1965). This is not necessarily to hold, as did *Bryan* v. *United States*, 373 F.2d 403 (5th Cir. 1967), and *United States* v. *England*, 347 F.2d 425 (7th Cir. 1965), that even undisputed facts must be submitted to the jury. Rather, the record before us does not permit us to rule as a matter of law with either party. Without a jury finding on the question whether the loan from the Retirement Fund was "indirectly" from the Union, we are required to reverse on Count One, which carries Count Two with it,[8] and remand for a retrial with appropriate instructions.

We sustain the convictions on Counts Four, Eight and Nine, however, the counts charging unlawful expenditures

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[7] Welfare and Pension Plans Disclosure Act, § 7(f)(1)(d), 29 U.S.C. § 306(f)(1)(D). Plans covering under 25 employees are exempt from the W.P.P.D.A. under 29 U.S.C. § 303(b)(4), and here there may be a question whether the officers' Retirement Fund was absorbed into and may be treated as one with a larger, if later, employees' plan of Local 11.

[8] Since Count Two is for failure to report the loan as one from Local 11, it stands or falls with the loan charge in Count One.

of Union funds, and on Counts Eleven to Fourteen inclusive, charging failure to report those expenditures.

Count Four charged appellants with unlawfully causing Local 11 to spend over $33,000 in 1964-67 for long-term auto leasing; Count Nine charged appellants with causing the Local to spend over $1,600 for appellant Ferrara's gas and oil expenditures. The principal defense—that the auto leases and gas expenditures were a necessary adjunct to Union organizing activities—was presented to the jury and rejected by it under appropriate instructions. By its verdict of guilty the jury found that appellants, without authority and for personal purposes, entered into long-term auto leases for themselves and their Union friends. The defense that Local 11's executive board had authorized the lease, which would not prevail if the Union were dominated as this one may have been, *United States* v. *Silverman*, 430 F.2d 106, 123 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971); *see United States* v. *Dibrizzi*, 393 F.2d 642, 645 (2d Cir. 1968), was also disbelieved by the jury in light of the testimony of four executive board members that such leasing was never discussed, let alone authorized. Such disbelief was doubtless furthered by the Government's proof of the spuriousness of unsigned minutes of an executive board meeting of May 23, 1960, purporting to authorize rental of cars for the president (Ferrara) and secretary-treasurer (Russell) (and the purchase of gas and oil for them). This proof consisted of showing that the typewriter ribbon used to type the purported minutes was not on the market until a year after the date borne by the document. *Cf. United States* v. *Silverman*, *supra* at 118.

Count Eight charged $325 of unlawful Union expenditures at the Freeport Tuna Club, of which appellant Russell was an officer and where he kept a 35-foot boat. The first defense to this charge was that the dinners were for Union business, but there was evidence that they were merely social occasions. Appellant Russell's testimony that the

Tuna Club was a "charitable" as opposed to a profit-making organization probably was not meant to suggest, as the Government argues, that the payments to the Tuna Club were charitable contributions; at least we view the testimony charitably. But plainly the jury was justified in finding that these were unauthorized expenditures for personal benefit—the relationship of Local 11 business to a tuna club's dinners is too tenuous to warrant further discussion.

Finally, the convictions on Counts Eleven through Fourteen, charging failure to include the converted sums as officer disbursements in the Local 11 Annual Reports, must be sustained. The auto, gas and oil and Tuna Club disbursements were squarely in the category of "disbursements to officers" (a heading in the Local's Annual Reports), to be reported as such[2] rather than reported, as they were, under some other general heading such as "Disbursements—For Other Purposes", or "Office and Administrative Expense." *United States* v. *Silverman*, *supra* at 116; *United States* v. *McCarthy*, 422 F.2d 160, 163 (2d Cir.), *appeal dismissed*, 398 U.S. 946 (1970). The only portion of the charge on these counts objected to below was the failure to charge that an accountant's advice negatived criminal intent, but the court's charge adequately covered the issues of intent and reliance upon the account-

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[2] 29 U.S.C. § 431(b) provides:

> Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail, as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—
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> . . .
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> (3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer . . . .

ant's advice.[10] *See United States* v. *Diamond*, 430 F.2d 688, 694-95 (5th Cir. 1970); *Bisno* v. *United States*, 299 F.2d 711, 720 (9th Cir.), *cert. denied*, 370 U.S. 952 (1962).

It is unnecessary to deal in detail with appellants' claims of improper evidentiary rulings. The only one warranting discussion relates to the court's restrictions on cross-examination of James Gleason, the Government's chief witness on the loan counts. Appellants sought to question

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[10] The judge charged:

> In order to find the defendants Russell and Ferrara guilty of these counts, 11 through 14, you must find established beyond a reasonable doubt the following essential elements:
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> 1. That either defendant or both were required to file annual reports on behalf of Local 11. No doubt about that. The law requires them to do that.
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> 2. That he, in fact, filed and signed the report or reports in question for the periods as alleged.
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> 3. That the defendant in question made false statements in these reports knowing them to be false.
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> And last,
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> 4. That the false statements, if such in fact they were, were false statements of material facts.

Further, he instructed the jury that:

> [Y]ou will notice that in respect to counts 11 through 14 all that is required is proof that the defendants knew that they were falsely misstating or failing to report material facts in the so-called LM2 reports. In other words, the burden of knowledge here is just about that. All you have to be satisfied of is that Ferrara or Russell, or both of them, knew that they were required to report this information and that they failed to do so.
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> Now, of course, as you know, the defendants say they didn't know they were required to do that; because they had reported the legitimate union expenses and that was that, and that these items were no more than that, and that they didn't overlook it, and that their accountants and lawyers approved it, and that was that.

Gleason concerning the substance of charges previously brought against him within the Union, apparently intending to attack Gleason's credibility on the basis of his hostility toward the Union. The Government objected to this line of inquiry, on the basis that the Union's action against Gleason had been declared null and void in a civil suit, as in violation of § 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(5), brought against the Union by Gleason. *Gleason* v. *Chain Service, Local 11*, 300 F. Supp. 1244, 1255 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 342 (2d Cir. 1970). Judge Tyler concluded that to allow questioning of Gleason about the Union charges, in light of the prior ruling in the civil action, would be "grossly unfair on credibility or any other grounds . . . ."

Appellants were able to elicit testimony that Gleason was dismissed, that his Union salary was terminated, and that the Union had brought nine charges against him, all of which went to the question of his hostility toward the Union and its officers. In light of the admission of such relevant credibility testimony, we cannot say that the trial judge, exercising the discretion granted him on evidentiary rulings, *United States* v. *Owens*, 263 F.2d (2d Cir. 1959), committed prejudicial error by disallowing interrogation regarding the specific charges made in null and void Union proceedings.

More important is the contention that reversal on the other counts is required because of a prejudicial "spill over" of the evidence relating to the loan. *Cf. Benton* v. *Maryland*, 395 U.S. 784, 797-98 (1969); *see* Wright, Federal Practice and Procedure: Criminal § 527 (1969). We have carefully examined this record and find no such prejudice here. The court's instructions carefully explored each charge, and the jury was obviously selective, acquitting appellants on four of the conversion counts and acquitting appellant Russell on the count charging him with failure to keep certain records. Moreover, the subject matter of

the counts for conversion and failure to report was unrelated to the counts concerning the Gleason loan. Accordingly, we affirm the convictions on all counts except One and Two. *See United States* v. *Adcock*, Docket No. 71-1289, slip op. 4681 (2d Cir. Aug. 16, 1971); *United States* v. *Febre*, 425 F.2d 107, 113 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970); *United States ex rel. Weems* v. *Follette*, 414 F.2d 417, 420 (2d Cir. 1969), *cert. denied*, 397 U.S. 950 (1970).

Ordering repayment of portions of the unauthorized personal expenditures ($17,000 by appellant Ferrara and $5,000 by appellant Russell) was proper. *United States* v. *Berger*, 145 F.2d 888 (2d Cir. 1944), *cert. denied*, 324 U.S. 848 (1945); *cf. United States* v. *Caiello*, 420 F.2d 471, 476 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). By limiting the amounts to be repaid to sums substantially lower than the total expenditures made, the trial judge here avoided the problem of determining independently the "exact amount" to be reimbursed to the Union, *United States* v. *Stoehr*, 196 F.2d 276, 284 (3rd Cir.), *cert. denied*, 344 U.S. 826 (1952), a problem which might otherwise require a remand. *See Karrell* v. *United States*, 181 F.2d 981 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950).

Judgment of conviction on Counts One and Two reversed and remanded; judgment of conviction on Counts Four, Eight, Nine, Eleven, Twelve, Thirteen and Fourteen affirmed.

APPENDIX B

Order Denying Petition for Rehearing

71-1069

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

FRED FERRARA, a/k/a FRED GLADSTONE, a/k/a FRED FERRARA GLADSTONE and ARTHUR RUSSELL,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
J. EDWARD LUMBARD
JAMES L. OAKES

December 6, 1971

Order Denying Motion

71-1069

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 6th day of December, one thousand nine hundred and seventy-one.

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

FRED FERRARA, a/k/a FRED GLADSTONE, a/k/a FRED FERRARA GLADSTONE and ARTHUR RUSSELL,
Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellants by notice of motion dated November 22, 1971, for leave to inspect and copy GX-3510, a sealed exhibit, and for leave to supplement the petition for rehearing filed herein be and it hereby is denied.

HENRY J. FRIENDLY
Chief Judge

J. EDWARD LUMBARD
JAMES L. OAKES
Circuit Judges

December 6, 1971

APPENDIX C

Statute and Rule Involved

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. § 401 *et seq.* are:

Sec. 201(b): Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

(1) assets and liabilities at the beginning and end of the fiscal year;

(2) receipts of any kind and the sources thereof;

(3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof;

all in such categories as the Secretary may prescribe.

Sec. 209(a): Any person who willfully violates this title shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this title shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this title shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(d) Each individual required to sign reports under sections 201 and 203 shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.

Sec. 501(c): Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Sec. 503(a): No labor organization shall make directly or indirectly any loan or loans to any officer or employee of such organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of $2,000.

Rule 6(e) of the Federal Rules of Criminal Procedure provides:

Disclosuer of matters occurring before the grand jury other than its deliberations and the vote of any juror may

be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.